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No. 06-676

In the
Supreme Court of the United States

KRISTOPHER OKWEDY and
KEYWORD MINISTRIES, INC.,
Petitioners,

-against-

GUY MOLINARI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondent
City of New York
100 Church Street
New York, New York 10007
(212) 788-1010

LEONARD J. KOERNER
Chief Assistant Corporation Counsel
Counsel of Record.

KRISTIN M. HELMERS,
ALAN G. KRAMS,
of Counsel.

QUESTION PRESENTED

Whether the City of New York violated the Establishment Clause when one of the City's five borough presidents and City attorneys criticized as intolerant petitioners' anonymous billboards containing biblical quotations describing homosexuality as sinful behavior?

PARTIES TO THE PROCEEDING

The petition's caption inaccurately identifies the respondents. Respondent is the City of New York ("City"), as petitioners acknowledge (Pet. at ii & n.1).

The defendants listed on the petition's cover as respondents have been dismissed from the case, with petitioners' consent. Guy V. Molinari, former borough president of the New York City Borough of Staten Island, was dismissed in the District Court (*infra* p. 2). PNE Media, LLC (PNE) settled with petitioners while the case was pending in the Court of Appeals, and the suit against it was discontinued (C.A. Docket Sheet, entries dated Mar. 27 & Apr. 6, 2006).

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case has changed course substantially since it began. Petitioners, Rev. Okwedy and Keyword Ministries, Inc. (collectively referred to as "Okwedy"), initially complained that their First Amendment rights under the Free Speech, Free Exercise, and Establishment Clauses were violated by Guy Molinari, then president of the Borough of Staten Island. Mr. Molinari wrote to PNE Media, Inc. (PNE), owner of the billboards where Okwedy's messages were posted, complaining about the billboards and asking the owner to contact his office. *See generally Okwedy v. Molinari*, 333 F.3d 339, 341–42 (2d Cir. 2003).

The District Court dismissed the complaint for failure to state a claim. *Id.* at 342. The Court of Appeals affirmed as to the Free Exercise and Establishment Clause claims, *Okwedy v. Molinari*, 69 Fed. Appx. 482, 484–85 (2d Cir. 2003), but held that it was premature to dismiss the Free Speech claim because "Molinari's letter could be found to contain an implicit threat of retaliation if PNE failed to accede to Molinari's requests." *Okwedy*, 333 F.3d at 344.

After remand, evidence produced during discovery established that Molinari's letter had nothing to do with PNE's decision to remove Okwedy's signs (C.A. App. at A146, A164, A166). Okwedy agreed to dismiss his suit against Molinari (*id.* at A256–57).

This left the City as the only remaining governmental defendant. Okwedy now pressed a newly added claim that Molinari's criticisms of Okwedy violated the Establishment Clause and were undertaken to implement the City's anti-discrimination policy, stated in § 8-101 of the New York City Administrative Code (Pet. App. at 25). Section 8-101 is the policy statement at the beginning of the City's Human Rights Law. *See* N.Y.C. Charter § 900 (defining Human Rights Law). The policy statement deplores the socially corrosive effects of various types of invidious discrimination, including discrimination based on sexual orientation.

Okwedy's only claim in this Court is that because his message was grounded in his religious beliefs, the City violated the Establishment Clause when Molinari and the City's attorneys criticized Okwedy's characterization of homosexuality as sinful (Pet. at i, 2–3 & n.2). While not relevant to his stated constitutional issue, the petition alleges absence of

police concern about threats against Okwedy, stating that the anti-bias officers who visited his church did not ask about those threats (Pet. at 5 & n.4); however, the record contains police reports showing that local police officers responded when Okwedy's wife reported delivery of a suspicious package. When it turned out to contain "graphic homosexual magazines" (C.A. App. A97), police investigated in an unsuccessful effort to track down the sender (*id.* at A233–47).

REASONS WHY THE PETITION SHOULD BE DENIED.

I. THIS CASE DOES NOT PRESENT THE ISSUE RAISED BY PETITIONERS.

Since the City is the only remaining defendant, Okwedy needed to show that the allegedly unconstitutional criticisms of his billboards constituted City policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478–81 (1986). However, as the Second Circuit explained, the critical statements could not be attributed to the City. They were made by a borough president who was not implementing the City's anti-discrimination policy and by City attorneys in legal argument and interrogatory responses. *Okwedy*, Pet. App. at 3–4; C.A. App. at A189 (reprinted in City Legal Memorandum, Pet. App. at 59). As the District Court noted, Borough President Molinari had no formal role in carrying out the City's Human Rights Law, and he was only vaguely aware of its contents. *Okwedy v. Molinari*, Pet. App. 7, 16 (E.D.N.Y. 2005), *aff'd*, Pet. App. 1; *compare id. with Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1118–19 (9th Cir.) (governing body sent letter and adopted formal resolution condemning newspaper advertisements calling homosexuality sinful), *cert.*

denied, 537 U.S. 886 (2002). Since no City action is at issue, Okwedy would not have a claim in this lawsuit even if his constitutional arguments were correct.

II. PETITIONERS HAVE NOT SHOWN ANY CONFLICT BETWEEN THE SECOND CIRCUIT AND OTHER CIRCUITS.

There would be no reason to grant the petition even if the statements criticizing Okwedy were the City's acts. Reduced to its essentials, Okwedy's complaint is that the Establishment Clause precludes New York City from criticizing statements at odds with its anti-discrimination policy when those statements are grounded in the speaker's religious beliefs. Section 8-101 deplores "groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on . . . sexual orientation . . . ." It says nothing about religion, and Okwedy concedes that government may "enshrine tolerance as the highest virtue" (Pet. at 13). However, Okwedy contends that government may not "further its interest in preventing discrimination by condemning religious beliefs and curtailing religious expression" (Pet. at 7).

Curtailment of expression is not at issue here. Petitioners' Question Presented complains only about criticism, not suppression (Pet. at i). Section 8-101 does not regulate speech, and Okwedy's claim that Molinari used the coercive powers of his office to pressure PNE into taking down Okwedy's billboards was dismissed on consent. The most Okwedy can claim is that a borough president and City attorneys criticized his attitudes towards homosexuality as bigoted and intolerant.

Okwedy has not identified any conflict between the Second Circuit and others regarding the claimed Establishment Clause violation. On Okwedy's first appeal, the Second Circuit held that there was no Establishment Clause violation. The Court approved the District Court's conclusion "that Molinari's conduct comports with the requirements of the test set forth in *Lemon v. Kurtzman*," 403 U.S. 602 (1971). *Okwedy*, 69 Fed. Appx. at 484; *accord Okwedy*, Pet. App. at 5. The District Court had explained that the City's anti-discrimination laws were secular in purpose and did not run afoul of the Establishment Clause because they offended some individuals' religious beliefs. *Okwedy v. Molinari*, 150 F. Supp. 2d 508, 519–20 (E.D.N.Y. 2001), *aff'd*, 69 Fed. Appx. 482, *rev'd in part on other grounds*, 333 F.3d 339. And the District Court concluded that Okwedy's condemnation of homosexuality was not immune from criticism because it was grounded in religion. Indeed, the Court said that special treatment of Okwedy's viewpoint would offend the Establishment Clause's principle of neutrality towards religion. *Id.* at 520.

Okwedy's claim of a conflict is premised on the mistaken proposition that the Second Circuit ruled that government speech about religion will not violate the Establishment Clause unless it involves threats, coercion, or intimidation (e.g., Pet. at 16, 17). The Second Circuit's treatment of Okwedy's Establishment Clause claims is discussed in the preceding paragraph. The Court's references to government threats and intimidation were made in connection with Okwedy's claim—not raised here—that his Free Speech rights were violated when Molinari wrote to PNE, complaining about Okwedy's billboards. *See Okwedy*, 333 F.3d at 342–43; *Okwedy*, Pet. App. at 4.

On Okwedy's first appeal, the Court reinstated his Free Speech claim and remanded it for the District Court to consider whether Molinari had impermissibly coerced PNE into removing Okwedy's billboards. *Okwedy*, 333 F.2d at 344. The claim was later dismissed on consent (*supra* p. 2).

Like the other circuits quoted by Okwedy, Pet. at 17–18, the Second Circuit recognized that government must be neutral in matters of religious doctrine and denominational preference. *Okwedy*, 69 Fed. Appx. at 484–85. The decisions relied on by Okwedy do not suggest that the Establishment Clause is violated when government officials and employees assail a speaker's assertion that homosexuality is sinful. The criticism of Okwedy's message was far less pointed than the condemnation of "'the Religious Right'" contained in a formal Board of Supervisors resolution that one court found did not violate the Establishment Clause. *Am. Family Ass'n*, 277 F.3d at 1119. There, the government not only made the reference quoted above. it linked the advertisers' religious message to a particularly notorious killing of a gay man. *Id.* In the instant case, the critical statements attacked Okwedy's view of homosexuality, but did not assail religion, either in general or as practiced by Okwedy (C.A. App. at A189 (*reprinted in* City Legal Memorandum, Pet. App. at 59)). The Establishment Clause requires that government "must be neutral in matters of religious theory, doctrine, and practice." *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968). It does not prevent the government from criticizing a religious person's viewpoint on a secular issue.

Debate on many public policies would be stifled if the Constitution prohibited officials from criticizing speakers who take positions grounded in their

religious beliefs. Given the diversity of religious tenets and practices in our country—diversity encouraged by long-held values and protected by the Constitution—many government policies offend someone's religious principles. Just as the Establishment Clause is not violated when government conduct "happens to coincide or harmonize with the tenets of some or all religions," *McGowan v. Md.*, 366 U.S. 420, 442 (1961), it is not violated when government adopts and defends a secular policy at odds with someone's religious principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondent
City of New York
100 Church Street
New York, New York 10007
(212) 788-1010

LEONARD J. KOERNER
Chief Assistant Corporation Counsel
Counsel of Record.

KRISTIN M. HELMERS,
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